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No. 82-1962

In The

# Supreme Court of The United States

October Term, 1982

L. A. STEELE,

*Petitioner,*

*vs.*

ALLEN L. LAMAR,

*Respondent.*

*On Petition For Writ of Certiorari*
*From The United States Court of Appeals*
*For The Fifth Circuit*

## BRIEF FOR RESPONDENT IN OPPOSITION

DAN S. BOYD
*Counsel for Respondent*

JOHNSON & SWANSON
4700 InterFirst Two
Dallas, Texas 75270
(214) 745-2135
*Of Counsel*

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS 75208 — (214) 748-6022

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## BRIEF FOR RESPONDENT IN OPPOSITION

### QUESTIONS PRESENTED

I. **IS A DEPRIVATION OF THE RIGHT OF ACCESS TO THE COURTS ESTABLISHED BY A SHOWING THAT STATE OFFICIALS HAVE ENGAGED IN CONDUCT CALCULATED TO HARASS AN INMATE FOR HAVING MADE RESORT TO THE COURTS, EVEN WHEN SUCH HARASSMENT DOES NOT DETER THE INMATE FROM CONTINUING TO ENGAGE IN LITIGATION ACTIVITIES?**

**II. SHOULD THIS COURT CURTAIL THE LEGITIMATE SCOPE CURRENTLY GIVEN IN LOWER COURTS TO FEDERAL RULES OF EVIDENCE 804(b)(3), 803(24), AND 404(b)?**

## OPINION BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 558, *reh. denied*, 698 F.2d 1286 (5th Cir. 1983) (Appendices A and B of the Petition). The order of the trial court appears at Appendix C of the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## STATUTE INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."

## STATEMENT OF THE CASE

### A. *Course of Proceedings and Disposition Below*

This case is a suit for damages based on 42 U.S.C. §§1983, *et. seq.* Lamar was an inmate confined in the Texas Department of Corrections (TDC) at the time the cause of action arose, and Steele was an employee of TDC at that time. Lamar alleged that Steele, acting under color

of state law, engaged in various sorts of conduct calculated to retaliate against Lamar for having filed and otherwise participated in lawsuits against TDC personnel, to punish Lamar for having filed and participated in such litigation, and to attempt to deter him from continuing his prosecution and/or participation in such litigation in the future.

The case was tried to a jury, which in answer to the first special interrogatory, found that Steele had engaged in conduct calculated toward either (1) Punishing Lamar's resort to access to the courts, (2) threatening such punishment, or (3) discouraging him from participating in such litigation. (R. 250). However, in response to Special interrogatory Number two, the jury answered negatively when asked whether Steele had "unnecessarily and wantonly inflicted emotional distress on the plaintiff Allen L. Lamar." (R. 250, 251).

The court, over objection from Lamar, had conditioned or predicated the interrogatories so that the jury was instructed not to answer any of the remaining interrogatories, including those on actual and exemplary damages, unless they had responded affirmatively to both special interrogatories numbers *one* and *two*. (R. 251, 252). Consequently, the jury did not answer any of the other four special interrogatories submitted, including those on actual and exemplary damages; the court accepted the verdict. (T. 467).

On December 17, 1980, the trial court denied the motion for judgment of Steele and granted Lamar's conditional motion for judgment on the verdict (conditioned on non-waiver of errors made in connection with the con-

ditioning of the special interrogatories, as discussed above). This judgment grants judgment against Steele in favor of Lamar for one dollar. (R. 306). Later, the trial court awarded attorneys' fees to Lamar.

Steele filed notice of appeal. (R. 409). Later, Lamar filed notice of appeal. (R. 413).

The opinion of the Fifth Circuit panel was issued December 14, 1982. The Court of Appeals affirmed the judgment as to liability, finding a deprivation of the right of access to the courts, and remanded for a new trial solely on the issues of actual and exemplary damages. Petitioner filed a timely Suggestion for Rehearing *En Banc*. It was treated also as a Motion for Panel Rehearing and was denied on February 28, 1983.

**B. *Statement of Facts***

Lamar was incarcerated at the TDC Ellis Unit from 1968 to 1979. In support of his contentions, Lamar presented evidence that Steele, in retaliation against Lamar's having resorted to access to the courts, (1) caused Lamar's legal materials to be burned (T. 208-215); (2) caused another inmate to threaten bodily injury to Lamar if Lamar did not cease his litigation activities (T. 88-90); (3) threatened Lamar by stating that if he (Lamar) did not pack up all of his legal materials and get rid of them, he (Steele) would "send Lamar home in a pine box." (T. 66, 68); (4) "invited" Lamar to attempt to stab Steele while Steele himself was armed with a large knife (T. 51, 52); and, (5) asked another inmate to stab Lamar (T. 182-185). Lamar did not cease his litigation activities in response to this conduct of Steele.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner claims that the decision below conflicts with this Court's decision in *Baker v. McCollan*, 443 U.S. 137 (1979). Petitioner fastens upon the following language in *Baker*.

> The first inquiry in any §1983 suit, therefore is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no deprivation, the state of mind of the defendant is wholly immaterial.

443 U.S. at 140.

Petitioner utilizes the above language for the proposition that there cannot be a §1983 violation unless threats made by the state actor actually succeed in causing the inmate to cease litigation activities.

*Baker v. McCollan* involved a claim of false imprisonment, which under the facts of that case was a state law cause of action in the guise of a constitutional violation. The issue here, however, is not one of the state tort law, but concerns the right of access to the courts, a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 838 (1977).

By citing *Baker v. McCollan*, Petitioner merely begs the question of whether an "actual" deprivation must take place before an §1983 action accrues. *Baker v. McCollan* does not determine under what circumstances an "actual" deprivation takes place; it holds only that the

deprivation alleged was not of a right "secured by the Constitution and laws."

This Court has already held, in effect, that a violation of the right of access to the courts does not necessarily require that an inmate be induced to cease litigation activities. In *Johnson v. Avery*, 393 U.S. 483, 485 (1969), this Court stated that the right of access "may not be denied *or obstructed.*" (emphasis added). The Court in *Johnson* also quoted *Ex Parte Hull*, 312 U.S. 546, 549 (1941) for the proposition that state officials cannot "abridge or impair" a prisoner's right of access to courts. In *Bounds v. Smith*, 430 U.S. at 823-824, this Court held that the right of access encompasses more than merely assuring unrestricted communication between inmates concerning legal matters.

The decision below properly applies the rules of *Johnson, Bounds* and *Hull.* The word "obstruct" is defined by Webster's Third International Dictionary, Unabridged, as ". . . to take an obstacle in or fill with obstacles or impediments to passing . . . to be or come in the way of; hinder from passing, action, or operation."

Can there be any doubt that a threat, by an armed guard with total physical control over a prisoner's environment, to send the prisoner "home in a pine box" if he did not get rid of his legal materials "comes in the way of" his use of those materials? Can there be any doubt that burning one's legal materials is an "obstacle" to the "operation" of the prosecution of a case? Can there be any doubt that life-threatening actions and remarks are "impediments" to the doing of the thing which induces the threat? Clearly, the verdict in this case supports a

violation of the right to access under the decisions of this Court, and the Fifth Circuit was, therefore, supported by precedent from this Court in affirming as to liability.

*Bounds* and *Johnson* do not require that the obstruction be successful in order to constitute a violation of the right of access. Otherwise, why would the Court use the language "deny *or* obstruct"? To deny implies a successful obstruction; but punishing the exercise of the right and obstructing its exercise is itself a violation. This was recognized by the Fourth Circuit in *Hudspeth v. Figgins*, 584 F.2d 1345 (4th Cir. 1978), which, citing and following *Bounds* and *Johnson*, concluded:

> A threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts. *Nor is it necessary that the prisoner succumb entirely or even partially to the threat. It is enough that the threat was intended to impose a limitation upon the prisoner's right of access to the court and was reasonably calculated to have that effect.*

584 F.2d at 1348 (emphasis added). Accordingly, the conclusion reached by the Fifth Circuit in this case is as natural an application of *Bounds* and *Johnson* as was the Fourth Circuit's decision in *Hudspeth*.

Petitioner claims that the Fifth Circuit imposed liability on the basis of "an abstraction." This is merely another way which Petitioner chooses to characterize its argument, *i.e.*, that there can be no deprivation unless the prisoner is actually coerced into ceasing litigation activities.

The result advocated by Petitioner would force a prisoner, while engaging in constitutionally protected activities, to go about this activity while laboring under the apprehension that death or punishment could be the result. The Petitioner's position would have this Court require the Sword of Damocles fall before relief could be had. The controlling decisions of this Court have already effectively rejected this position.

## II. THIS CASE IS NOT A "MERE WORDS" CASE AND THEREFORE PETITIONER'S USE OF THE PRECEDENT FROM THAT AREA IS INAPPOSITE.

Petitioner attempts to convert the evidence in this case into an "angry words" case. However, all cases cited in the Petition are completely inapposite to the access to courts question. In *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979), no obstruction of access to courts was involved save the refusal of the sheriff to mail a legal letter. However, the letter was clearly not entitled to constitutional protection. In *Arroyo v. Shaefer*, 548 F.2d 47 (2nd Cir. 1977), there was neither allegation nor finding of denial of access to the courts. In *Ellingburg v. Lucas*, 518 F.2d 1196 (8th Cir. 1975), the court merely held that defamation is not a constitutional tort.

Petitioner cites the above cases for the proposition that "verbal abuse alone — including racial invective and threats — does not rise to the level of a constitutional tort." These cases merely stand for the proposition that more than a common-law tort is required for a civil rights act violation. As was said above, much more is involved here because the judgment is based on a verdict finding that Steele's conduct was related to Lamar's litigation

activities, thereby implicating the constitutional right of access to the courts.

## III. THE STATEMENT OF THE DECEASED THIRD PARTY REGARDING PETITIONER WAS PROPERLY ADMITTED, AS WAS THE STATEMENT CONCERNING SIMILAR PAST ACTS OF PETITIONER

Petitioner presents no persuasive grounds for granting the petition in connection with the alleged evidentiary errors. The statement of Smith was against interest thus admissible under 804(b)(3) of the Federal Rules of Evidence. Furthermore, the statement meets all the requirements for admissibility under 803(24). The testimony concerning Petitioner's prior threats under identical circumstances falls squarely under rule 404(b).

While maintaining that Petitioner's evidentiary objections are unwarranted, it is clear from the record that regardless of the admission of the above statements, the verdict may be supported by other evidence. Accordingly, it would be a waste of judicial resources to grant the Petition on this ground when the outcome of the case would remain unchanged.

## IV. THE FACTS WHICH GIVE RISE TO A CLAIM OF ACCESS DENIAL ARE BEING ADEQUATELY DEVELOPED IN THE LOWER COURTS.

Petitioner claims that Supreme Court guidance is required in this area. However, this Court has given lower courts adequate parameters within which to determine whether an access violation has taken place in *Bounds v. Smith, supra,* and *Johnson v. Avery, supra.*

## CONCLUSION

For the above reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

Dan S. Boyd
JOHNSON & SWANSON
4700 InterFirst Two
Dallas, Texas 75270
(214) 745-2135

## CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief for Respondent in Opposition has been mailed, by certified mail, return receipt requested to Leslie A. Benitez, attorney for Petitioner, this 7 day of July, 1983.

Dan S. Boyd